



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 205 OF 1998

INCHAPE SHIPPING SRICES KENYA LIMITED.....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL SUIT NO. 278 OF 2001

KENYA PORTS AUTHORITY.....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. Two plaintiff filed separate suits which were then consolidated by an order of the court dated 6/10/2010. the first suit was by a plaintiff dated 19.06.1998 later amended on the 16/10/2018 claiming a sum of Kshs 1,977,233.40 plus compounded monthly interests at bank rates from 08.11.1995 and costs of the suit (**henceforth referred as 1st suit**), and the second was lodged on the 25.05.2001 by a plaintiff dated 24.05.2001 and later amended on the 23/7/2017 claiming the sum of Kshs 5,489,383.20 with interests at commercial rates from 25.07.2000, being the date the demand was made, till payment in full together with costs of the suit (**herein referred as the 2nd suit**).

2. In both suit, the plaintiffs aver that between 21/10/1994 and 25/8/1995, the 1st plaintiff drew 6 cheques payable to 2nd plaintiff amounting to Kshs. 8,149,480.60. Four (4) of those cheques were intercepted or converted and presented to the defendant at its said branch for collection which collection the defendant did and had the proceeds credited to accounts opened and operated by Pamo ship Contractors and Sokam Enterprises Limited. The plaintiff contend that that collection was wrongfully and effectively converted the proceeds to its own use to the detriment of the plaintiff thereof. Cheques No. 740540 and 740657 were respectively frozen and stopped by the 1st plaintiff and defendant when investigations began. The value for cheque No. 740540 have remained with the defendant while the value of cheque No. 740657 did not leave the 1st plaintiff bank.

3. The 1st plaintiff then issued the 2nd plaintiff with alternative cheques amounting to Kshs 3,262,632.90 to cover a portion of the converted sum in the sum Kshs 1,977,233.40 leaving a balance of Kshs 5,489,383.20 as the sum of indebtedness between the two plaintiffs. The plaintiff is also claiming Kshs 1,977,233.40 from the defendant. In summary the 1st suit claims the value of the cheques as the drawer while the 2nd defendant makes the claim as drawee. Both fault the bank for having accepted for clearance cheques drawn by the 1st plaintiff in favour of the 2nd plaintiff which were closed and thus nonnegotiable.

4. The two defendants filed two separate statements of defense to the two suits and an amended statement of defence to the 2nd suit dated 26/7/2001 denying all the allegations and pleading in the alternative that if any such cheques were received then the same were properly made out in favour of the two named account holders and the only thing the defendant did was to discharge its mandate to credit the beneficiary accounts hence no liability touches on it. It is of note that after the plaints were subsequently amended, no replies were ever filed with the consequence that the defendant stands to rely on the statements of defence filed prior to such amendment.

5. Pursuant to case conference directions given on the 26.06.2018, the matter proceeded for hearing on 13/05/2019 with the each of the parties calling one witness. Prior to the hearing the parties had settled and filled a statement of agreed issues setting out three substantive issues and two consequent issues being costs and interests.

Evidence led

6. **PW1, Joshua Lumula**, the Finance Manager of the plaintiff in the 1st suit, adopted his earlier recorded statements dated 19/6/2015 and 26/10/2016. He testified that on various dates between 21/10/1994 and 9/8/1995, 5 cheques were drawn by the plaintiff payable to Kenya Ports Authority. On 6/9/1995, the manager of Stanbic Bank Limited Mombasa called him to confirm the payment of the 5th cheque and he told him that it was payable to KPA and not to Sokam Enterprises Limited. That on 22/9/1995, a reconciliation exercise was carried out as a result of complaints received from KPA, that the 5 cheques made out to them had not been received. Investigations by the plaintiff's bank revealed that, the said cheques had been presented to the plaintiff's said bankers through the clearing house by the defendant, and the proceeds therefrom were credited to payees other than KPA, with the 5th cheque being frozen. He took the view that it was the defendant's duty as the collecting bank to ensure that the cheques, being crossed, were only paid into the correct account of the payee. The defendant is accused of wrongfully converting the 5 cheques for its own use and thus wrongfully depriving the plaintiff, thereby occasioning it to suffer damage in the said amounts.

7. In cross examination by the plaintiffs advocate in the 2nd suit, he stated that KPA handled their vessels out of which they billed for services rendered. He confirmed that a cross cheque is only payable to the drawee and cannot be endorsed for payment to a 3rd party. He further confirmed that all the cheques herein had been crossed.

8. In cross examination by the defendant, he referred to a letter dated 25/7/2000 in the plaintiff's bundle, where KPA agreed it received the cheques, but the same were cashed by 3rd parties. The letter dated 2/1/1995 confirmed that the cheques were intercepted and cashed by 3rd parties. Even though they sought payment from Stanbic at one time, the loss is attributable to Co-operative Bank and the fault was of the defendant.

9. In re-examination, he said that the KPA bundle of documents at page 9 and the plaintiff's bundle of documents at page 47 clarify the duties and obligations of a paying and collecting bank.

10. **PW2, Said Mata** the Principal Account of the 2nd plaintiff gave evidence that his duties included fund collection, payments and treasury management. In that capacity, he raised bills for clients to pay so as to clear the bills and would accept payment by cheques to which they would issue an acknowledgement after receipt. He adopted his recorded statement dated 20/11/2018 as his evidence in chief and stated that around the year 1994-1995, different bills were issued to Inchape Shipping Company in respect to shipping services to various vessels, where Inchape was the agent. Around the same time, there was banking fraud which involved the cheques drawn in favor of KPA which had been reported and in September 1995, the Banking Fraud Investigation Department informed KPA about some lost cheques, which were not presented to the receiving clerks at KPA. The procedure was that once a cheque was received by KPA, a receipt was issued to the payee. No such receipt was issued in this instance to suggest that the cheques were never received by KPA. At the time of fraud, KPA did not operate or maintain any account with the defendant and that the cheques were crossed and not negotiable thus they were not cashable/ or collectable in favour of a third party other than the drawee. The ensuing investigations revealed that cheques Nos. 651235, 653012, 697699 and 698651 for a total sum of Kshs. 6,612,031.20 were wrongfully converted by the defendant and credited into an account held by entities not known or affiliated with the plaintiffs and who had opened accounts with the defendant. Cheque No. 740540 for Kshs. 854,545.40 was frozen by the defendant whereas cheque No. 740,657 for Kshs. 682,864 was stopped by the drawer. The Plaintiff issued alternative cheques to KPA in the amount of Kshs. 3,262,632.90 in part payment of the converted amounts leaving a balance of Kshs. 5,489,383.20 as the balance of the due debt to the 2nd plaintiff. The 2nd plaintiff therefore blames the defendant of unethical conduct, bank fraud, conversion who should be held liable for the loss suffered by the plaintiffs for the payment of the sums plus interest at court rates, costs and interest on costs.

11. During cross examination, the witness stated that the cheques were never received by KPA, though in a letter, he does state that they were received but cashed by 3rd parties and that two employees of KPA were arrested and charged in connection with the lost cheques. At page 18 of KPA's bundle, there is a confirmation of receipt of the cheques by KPA and the said cheques could not be accessed by Co-operative bank other than KPA authorizing the release. KPA had no account with Co-operative bank and could not present the cheques for payment. He added that some KPA employees were arrested and charged, together with others, with the loss of the cheques. The cheques were microfilmed by Stanbic bank and credited to an account of PAMO who were not the drawee.

12. **DW1 Francis Rhiga**, the branch Manager of the defendant, adopted his earlier recorded statement dated 16/01/2019 as his evidence as evidence in chief then stated that he had been an employee since 2002 and was well versed with the day to day banking processes based on the records maintained. He confirmed that KPA had never held an account at Cooperative Bank and further that the bank did actually receive the alleged cheques though they were payable to Pamo Ship Contractors or Sokam Enterprises Limited, as evidenced by the cheques deposit slip for each cheque deposited. He maintained that the bank did not receive any cheques payable to KPA and that the proceeds of the cheques so received and cleared by the bank were deposited to the accounts of the persons who had been indicated as payee of the cheques, for the use and benefit of the account holder. Further, the bank can never collect a cheque presented to it unless the same is payable to the holder of an account with the bank. The cheques for Kshs. 854585.40 were deposited in account No. 6276 held by Sokam Enterprises Limited as evidenced by the account statements. The cheques for Kshs. 1,603,842.90, Kshs. 1,543,701.80, Kshs.1,569,672.70, Kshs.1,894,810.80 were deposited in account No. 6148 held by Pamo Ship Contractors, although he could not get the account statements for that account despite exercising due diligence but maintained the denial that the bank never intercepted the cheques nor did it commit wrongdoing by participating in any fraudulent acts.

13. In cross examination, he stated that at the time of the dispute, he was not an employee and he could neither trace the statements of the accounts nor could he establish if the sums were withdrawn from the said accounts. The sum credited to Sokam Enterprises Ltd was never paid out but frozen and the money is still in the bank. He stated that he did not have copies of the cheques, but agreed that crossed cheques are not endorsable and cannot be cleared in an account other than the drawee. He denied having come across cheques drawn as alleged by the plaintiffs and relation to this matter and that KPA did not have an account at Co-operative Bank. He confirmed having the details of the individuals behind Pamo Ship Contractors though they did not make them a party to this suit. He however had no details of the individuals behind Sokam or their account closing statement and lastly that the effect of a crossed cheque is that the cheque is not capable of clearance in any other account other than the drawee.

Analysis and determination

14. Having read and analysed the pleadings and evidence given during trial, together, with the written submissions, I adopt the issued the parties had filed save that I note that the submissions have now brought out a new issue based on limitation which was never pleaded but goes to jurisdiction and must be dealt with. I will deal with that issue first then handle the agreed issues in the order set by the parties.

15. The new issue by the defendant comes out to be that, when the suit was file, it was statute barred because being a cause in tort it ought to have been filed within three years but wasn't so filed. Even if not pleaded, like it was not here, it is a matter that goes to jurisdiction and the court is bound to deal with it as the first issue to be sure that there was jurisdiction in the trial court to deal with the matter as it did. In **Dubai bank (K) ltd vs Kwanza Estates Ltd [2017]eKLR**, the court of appeal when faced with the issued had this to say:

It would therefore have been prudent for the appellant to raise the question of jurisdiction before the superior court as that way this court would have had the benefit of reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In *Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR*, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:

*“It has been held in the case of *Kenidia Assurance Co. Ltd v Otiende (1989) 2 KAR 162* that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction.”*

The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court.

16. It is therefore open for the issue to be raised for the first time even on appeal and the defendant is therefore within the law to have done so even though it would have been more desirable to have had the matter pleaded and responded to at trial and in *limine* so that if the matter was in deed time barred then no judicial time ought to have been employed as has been done here. I must therefore review the pleadings filed and he evidence led to satisfy myself whether the matter was filed in time or out of time. In doing so I must look at the two separate dates the consolidated suits were filed.

17. It is common place that the subject cheques got lost or intercepted by persons not party to these proceedings intercepted and their value collected by the defendant between October 1994 and August 1995. Kenya Ports Authority (henceforth KPA) made a demand for recompense on the 2.11.1995 an indication that the loss had been brought to its attention at least by that date. In terms of the stipulations of section 4(2) of the Limitation of Actions Act, KPA had up to the 1.11.1998 to file its suit. It did not act in time and only did so on 25th day of May 2001 by a plaint dated the previous day. When filed, the cause was timed barred and the law precludes the court from entertaining it. It is on that account that I order that the suit by KPA be struck out in whole. However, as said before, a question on the competence of the suit which goes to jurisdiction like limitation needs to be raised at the earliest opportunity and ideally in the pleadings so that the opposite party is not ambushed and judicial time is used in an inefficient manner. That the defendant waited well up to the very last minute to raise the issue dictates that it be disentitled to the cost of the action. I make an order that suit No. 278 of 2001 is truck out with no orders as to costs.

18. So far what remains is the suit No 205 of 1998 to which no challenge on limitation has been raised. For it the issues as raised and settled by the parties calls to be answered. I chose to answer them seriatim in this order:

- a. Whether the defendant received for collection the 5 cheques?
- b. Whether the defendant collected the proceeds of the 5 cheques and converted them for their own use?
- c. Whether the plaintiffs are entitled to damages, and interest?
- d. Who meets the cost of the suits?

19. The first issue is not in dispute because, the 1st plaintiff has attached copies of the said cheques while the defendant by its written witness statement and oral exhibits also agree that it received the cheques drawn by the plaintiff. The answer to this question is in the affirmative and I need not say more.

20. Moving on to the second issue, throughout the trial, the defendant has been adamant that KPA has never held an account with it. The defendant further denies that KPA has ever been its customer and as such it could not have collected a cheque for its benefit. It proceeded to state that the cheques collected were for the benefit of its two customers being Pamoship Contactors Limited and Sokam Enterprises Limited. The plaintiff in the 1st suit, (henceforth Inchcape) produced copies of the original cheques, which clearly showed that KPA was the intended payee. The defendant avers that it could not produce copies of the said cheques, but instead produced bank deposit slips for the cheques, which revealed that Pamoship Contactors Limited and Sokam Enterprises Limited were the intended payees. In deed the defendant must be taken to be the custodian of the cheques it receives on behalf of its clients and that had the duty of full disclosure to court if the truth was to be dug out. The defendant ought to have exhibited to court the copies of the cheques it received from its customers to prove that those cheques were in deed in the name of such customers as payees and not made in favour of KPA. That the defendant failed to show the cheques it was cashing on behalf of its customer invite the inference that had it produced same the evidence therein would have been adverse to its case. In ***Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] eKLR***, the learned Judge rightly stated that:-

“Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is

entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.”

21. When that inference is made and taken on the face of the documents and evidence by Inchcape that the genuine cheques were in deed received by the defendant, I find it sufficiently proved that the defendant received the cheques drawn in favour of KPA and collected the value thereof in favour of its customers who were not the payees and thus not entitled to such value. That, in the courts view is conversion. Conversion because the defendant had no account operated by KPA and therefore had no right to receive and collect the value of the cheques on its behalf.

22. What is more, a closer perusal of the bank deposit slips reveals some obvious discrepancies and irregularities that could have been avoided by just modest diligence. To start with, cheque No. 651235 was deposited twice bearing different amounts and on different dates payable to different persons. The account number on Bank slip for cheque No. 698651 is inconsistently indicated as 006148 and also 06148. such was avoidable by the defendant but was left to pass.

23. Inchcape, produced a letter by Stanbic Bank Kenya Limited dated 25/10/1995 which states, and I quote:

“cheques were presented to us in the normal manner through the clearing Cooperative Bank. There was no endorsement on any of the cheques therefore Cooperative Bank had presented them to us as though they had credited on account of the payee in their book”

24. The investigation report by the Banking Fraud Investigation Unit states that individuals from all parties herein were involved. In explaining further how the fraud was conducted, it revealed that dummy cheques were presented to the defendant and somewhere along the line, the same were substituted with the genuine cheques. I find that as the persons in custody I find that assertion to have not been meaningfully challenged and I believe that to have been the only way the genuine cheques issued by Inchcape were cleared through the then clearing house and proceed collected by the defendant. I find that to be what happened and therefore it falls upon the defendant to explain how the cheques were swapped. No plausible explanation was offered and therefore I find the defendant liable for the loss thereby ensuing. In the case of Standard Chartered Bank Kenya Ltd v Intercom Services Ltd and 4 others. (2004) eKLR the court of Appeal held:

“In addition, cases relating to a collecting banker being sued in conversion and those relating to a paying banker sued for breach of contract raise different considerations. In the former case, it is for the banker to establish that he collected without negligence, and in the latter the burden is on the customer to prove negligence. The statutory protection is also different in the two types of cases”

25. It is therefore the duty of the defendant to prove that it did not act in a negligent fashion. The collecting banker is protected under section 3(2) of the Cheques Act with a stipulation that *‘where a banker, in good faith and without negligence and in the ordinary course of business, collects or credits a customer account with the value of proceeds of a prescribed instrument, it is not liable merely by reason only of his having received payment or of its failure to concern itself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee’.*

26. The question that I have endeavored to answer is whether, the defendant as the collecting banker acted in good faith and ordinary course of business while exercising reasonable care and skill. That question I have answered by highlighting the glaring discrepancies in the bank deposit slips which grounds my opinion that the defendant was negligent in its duty and did not act in good faith. This is compounded by the fact that the dummy cheques were interchanged with the genuine cheques while in its custody, for clearing to the paying bank. This is to court a demonstration that the defendant’s servants who handled the transaction involving the cheques were not only negligent but also intentional in their dealings in that regard. And it is to the court immaterial that they could have acted in concert with others.

27. The duty is upon the banker to exercise skill while dealing with transactions on the customer’s account. Large sums were moved, in quick succession, into its customers account and the defendant has completely neglected to prove any steps and/ or precautions it took, in ensuring that its customers were entitled thereto. Here I find that the defendant was not entitled to the proceeds of the cheques and that it is liable to Inchcape for the sum claimed.

28. The upshot is that while the suit by KPA stands struck out, I do find for Inchcape and enter judgment for it in the sum of Kshs 1,977,233.40 together with costs of the suit.

29. In the suit the plaintiff sought interests at bank rates compounded monthly from 08.11.1995 till payment in full. The reason given for that prayer is that the defendant being a bank has been in possession of that money and must have lent it out at an interest rate calculated in a compounded manner. In my view, interest is charged on a pecuniary judgment sum as away of rewarding the decree holder for the loss of opportunity on account of the money being kept away unfairly. It is also away of taking away from the defendant what it ought not retain without appearing to have retained it unjustly. In this I find persuasion in the decision in Veleo (K) Ltd v Barclays Bank of Kenya Ltd [2013] eKLR

”...the Defendant, having withheld the amount for a period of over twelve (12) years, it could be presumed to have applied the same to its business, and therefore gained significantly from the same. The opportunities lost by the Plaintiff in this instance would only be adequately compensated by applying a rate that would reflect the time value component to interest. The upshot is that I would uphold the trade and usage norm as practised by banks in Kenya. I see no reason why the Plaintiff herein should not enjoy the same method of calculation of interest as would have been employed and calculated payable by it, if it had been in default. As the Defendant bank has proved to be the party in default, I see no reason why it should complain that the calculation of interest that it would have expected cannot be reciprocated as a result of its default. Accordingly, the interest rate for the Decree purposes herein, is to be calculated on a compound interest basis, at the rate of 18% per annum, compounded with monthly rests until paid in full.

30. I do appreciate that it is at the discretion to award interest and assign the rate thereof. In doing so the court seeks to assign a recompense that serves the interests of justice in the case. Here I find that the interest rate that would be just is that the defendant would demand if it was its money being kept away. I take a judicial notice that bank in Kenya charge compound interests and therefore what is good for them should be good for all. I am equally aware that the rates have never been stagnant but have been swinging up and down. It is therefore not possible to assign one rate over the period. I will however take judicial notice that for the last decade the bank interest rates have largely oscillated between the lowest of 12% and 21 % with a mark-up for what is called base lending rate. Doing the best I can, I do award interest at 18% pa calculated on monthly rests from the date of the suit till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER, 2021

PATRICK J.O OTIENO

JUDGE